

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
GENEVA PENNYSAYER, INC.	:	DETERMINATION
for Revision of a Determination or for Refund	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period June 1, 1981	:	
through February 29, 1984.	:	

Petitioner, Geneva Pennysaver, Inc., 40 Castle Street, P.O. Box 751, Geneva, New York 14456, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 1981 through February 29, 1984 (File No. 801671).

A hearing was held before Arthur S. Bray, Administrative Law Judge, at the offices of the Division of Tax Appeals, 333 East Washington Street, Syracuse, New York, on January 13, 1988 at 9:15 A.M., with all briefs to be filed by May 31, 1988. Petitioner appeared by Lombardi, Devorsetz, Stinziano & Smith, Esqs. (Bruce E. Wood, Esq., of counsel). The Audit Division appeared by William F. Collins, Esq. (James Della Porta, Esq., of counsel).

ISSUES

I. Whether the Geneva Pennysaver qualified as a "shopping paper" under Tax Law § 1115(i).

II. Whether the Geneva Pennysaver constituted a newspaper and thus was exempt from the imposition of sales and use tax.

III. Whether Tax Law § 1115(i) is facially unconstitutional.

FINDINGS OF FACT

1. Petitioner, Geneva Pennysaver, Inc., published a shopping paper entitled "Geneva Pennysaver". The paper was published weekly and was distributed in the Geneva, New York local area without charge. The publication contained advertising, community news and community notices.

2. On September 20, 1984, as the result of an audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner, covering the period June 1, 1981 through February 29, 1984 for taxes due of \$9,486.54, plus interest of \$1,826.44, for a total of \$11,312.98.

3. On audit, the Audit Division determined that the publication did not qualify for exemption as a "shopping paper" under Tax Law § 1115(i) in that advertisements in the paper

exceeded 90 percent of the printed area of each issue. Consequently, the Audit Division found that the charges paid for the service of printing the paper were taxable. The taxes due on printing services amounted to \$9,306.01. The audit also disclosed tax due of \$180.53 on unsubstantiated nontaxable sales. Petitioner did not dispute the latter amount.

4. In order to determine the ratio of advertising space to nonadvertising space, the Audit Division analyzed 12 issues and made the following calculations:

<u>Issue</u>	<u>Total Area Available for Printing</u>	<u>Total Area of Nonadvertisements</u>	<u>Percent of Nonadvertisements</u>
6-3-81	2,772 sq. in.	97 sq. in	3.50
6-10-81	3,465	149.5	4.31
6-17-81	3,465	150.45	4.34
6-2-82	3,465	215.25	6.21
6-9-82	4,158	215.50	5.18
6-16-82	4,158	370	8.90
9-7-83	2,772	246	8.87
9-14-83	3,465	253.5	7.32
9-21-83	3,465	249.75	7.21
5-16-84	4,158	300.5	7.23
5-23-84	6,237	402	6.45
5-30-84	4,158	348.5	8.38

In its calculations, the Audit Division first determined the area available for printing on each page of the paper. This area amounted to 173¼ square inches which was verified with the printer. The borders along each page were not included in this calculation. The area available for printing on each page was multiplied by the total number of pages to determine the total area available for printing in each issue. The Audit Division next determined the area on each page consisting of nonadvertising space. These amounts were totalled and divided by the total available space per issue to determine whether the advertising space in the paper exceeded 90 percent.

5. The Audit Division considered the following items as nonadvertisements: the publication's bannerhead¹, public service announcements, articles of general interest, contest winners, community events, cartoons, local school menus, lost and found and like notices. Areas between these nonadvertisements and advertisements were determined to be half advertisement and half nonadvertisement. The space between two advertisements was considered all advertising; and the area between two nonadvertisements was counted as nonadvertising space. The Audit Division deemed all paid advertisements, including classified ads, to be advertisements. Sections of the paper which promoted petitioner's own services were also considered advertisements, except that portion of such sections which included an area with a form to be returned by the reader. Finally, the paper devoted certain pages of each issue to advertisements for similar businesses. These sections, for example, "Automotive Sales & Services" and "Good Times Guide", had banners across the top of the page consisting of the title of the section. The space for the banners was considered advertising.

6. In July 1983, the Department of Taxation and Finance published a memorandum (TSB-

¹The term "bannerhead" refers to the publication's name on the front page.

M-83[20]S) entitled "Shopping Papers and Advertising Supplements" for purposes of clarifying the Department's policy regarding the term "advertisements" and the 90 percent rule for shopping papers. The memorandum defined advertisements as "all the material for the publication for which the publisher receives consideration and which calls attention to something for the purpose of getting people to buy it, sell it, seek it, or support it. Advertisements also include any printed area in which the shopping paper advertises its own services. The area devoted to public service announcements, the publication's bannerhead and the editorial box should not be considered as advertisements when applying the 90 percent rule, nor should any area provided for free classified advertisements." The Audit Division followed the guidelines set forth in the memorandum in making the determination that the shopping papers did not comply with the 90 percent rule.

7. Petitioner sold advertising space by column inches. If an ad was placed in a section with a banner, the advertiser did not pay for the banner space.

SUMMARY OF PETITIONER'S POSITION

8. Petitioner argued that the term "printed area" as used in the statute means only the actual area of the paper upon which there has been print imposed rather than the Audit Division's interpretation of such term as "printable area". Petitioner maintained that by using the area available for printing, the Audit Division's method improperly included the blank or gutter space² as part of the printed area. Petitioner illustrated an alternative method of dividing the column inches devoted to advertising by the total column inches of all printed matter to determine compliance with the 90 percent rule.

9. Petitioner also took the position that the Audit Division misinterpreted the statutory term "advertisements". Petitioner argued that the Audit Division erroneously considered "nonpaid space" as advertisements in its calculations. Such nonpaid space consisted of "house ads" or "filler ads", free classified-type ads and banners referred to in Finding of Fact "5". The house ads promoted petitioner's own services and were often inserted to fill blank spaces that existed after other advertisements and news items had been laid out on a page. Notwithstanding petitioner's disagreement with the Audit Division's methodology of computing the 90 percent rule, petitioner calculated an additional 230.23 square inches of nonadvertising space in the May 30, 1984 issue using the nonpaid space. If such amount was considered in the total area of nonadvertising, that issue would qualify under the Audit Division's method.

10. Petitioner alternatively argued that if the publication did not qualify for the exemptions provided under Tax Law § 1115(a)(20) and Tax Law § 1115(i) as a "shopping paper", it was entitled to a tax exemption as a newspaper under Tax Law § 1115(a)(5). Petitioner maintained that the publication satisfied all the requirements of a newspaper set forth in 20 NYCRR 528.6(b) and that any distinction between shopping papers and newspapers made by the Audit Division based on content analysis was unconstitutional. Petitioner further challenged the constitutionality of Tax Law § 1115(i) as vague, specifically the requirement that advertisements cannot exceed 90 percent of the printed area. Petitioner asserted that the 90 percent rule is insufficiently defined thus leaving said rule open to interpretation and different measuring methods resulting in an arbitrary and capricious denial of the exemption.

²Gutter space refers to the white space between advertisements and news items.

11. Petitioner asserted further that the Audit Division did not make available sufficient guidelines by which a taxpayer could determine whether or not, upon audit, its publication would comply with the exemption provision of Tax Law § 1115(i). It is noted that no inquiries were formally made by petitioner to the Audit Division for advice as to the Audit Division's position on the 90 percent rule, but rather petitioner relied upon advice from the New York State Advertising and Publishing Council to the effect that house ads and other nonpaid space were not advertising.

CONCLUSIONS OF LAW

A. That Tax Law § 1115(i) provides for an exemption from the imposition of sales tax imposed pursuant to Tax Law § 1105(c)(2) upon the receipts from the sale of printing services performed in publishing a shopping paper. Tax Law § 1115(i)(B) and (C) set forth requirements to be met by a publication in order to be defined as a shopping paper within the meaning of section 1115(i), thereby gaining the benefit of the exemption. Of the requirements set forth, the following requirement is at issue herein:

"The advertisements in such publication [a shopping paper] shall not exceed ninety percent of the printed area of each issue." (Tax Law § 1115§[i][C]. See also, 20 NYCRR 528.6[d].)

B. That the Audit Division's method of calculating the ratio of advertisements to nonadvertisements to determine compliance with Tax Law § 1115(i)(C), as well as its determinations as to which areas of the publication constituted advertising and nonadvertising, were reasonable. Statutes creating a tax exemption are to be strictly and narrowly construed (Matter of Grace v. State Tax Commission, 37 NY2d 193). The burden of proving entitlement to a tax exemption rests with the taxpayer (Matter of Young v. Bragalini, 3 NY2d 602). To prevail over the administrative construction, petitioner must establish not only that its interpretation of the law is a plausible one, but also that its interpretation is the only reasonable construction (see, Matter of Lakeland Farms Co. v. State Tax Commission, 40 AD2d 15). Petitioner has failed to meet its burden of establishing that the Audit Division's interpretation of Tax Law § 1115(i) was unreasonable (see, Matter of Blue Spruce Farms v. State Tax Commission, 99 AD2d 867, affd 64 NY2d 682; Matter of Irondequoit Shopper, Inc., State Tax Commission, January 16, 1987). Moreover, petitioner failed to establish that any issue qualified under the 90 percent rule using its alternative methodology.

C. That Tax Law § 1115(a)(5) provides an exemption from sales and use taxes for receipts from the sale of newspapers and periodicals. Tax Law § 1118(5) provides an exemption from use tax with respect to the paper used in the publication of newspapers and periodicals. Since the Geneva Pennysaver was distributed without charge, the exemption under Tax Law § 1115(a)(5) is not applicable. Likewise, Tax Law § 1118(5) is inapplicable since the Audit Division did not impose any tax on purchases of paper. Accordingly, Issue II is rendered moot.

D. That petitioner's claim that Tax Law § 1115(i) is facially unconstitutional is a matter beyond the jurisdiction of this forum. It is sufficient to note that the constitutionality of the laws of the State of New York is presumed at the administrative level.

E. That the petition of Geneva Pennysaver, Inc. is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued September 20, 1984 is sustained.

DATED: Albany, New York
October 14, 1988

/s/ Arthur S. Bray
ADMINISTRATIVE LAW JUDGE